INDEPENDENT REVIEW INTO THE CRIME AND CORRUPTION COMMISSION'S REPORTING ON THE PERFORMANCE OF ITS CORRUPTION FUNCTIONS

SUBMISSION ON BEHALF OF MS JACKLYN (JACKIE) TRAD

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Independent CCC Publication Review

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INTRODUCTION

1. It is respectfully submitted that the terms of reference for this Review engage three fundamentally important principles.

2. The first fundamental principle is the law's protection of reputation. The extent of that protection now includes that provided by s. 25 of the *Human Rights Act 2019* (**the HR Act**). That section provides that a person has the right "not to have the person's reputation unlawfully attacked".

3. The findings of official inquiries carry with them an authority that can "blast a…[person's]…reputation for ever – perhaps to ruin…[their]…prospects for life".[1] The law ameliorates these effects, to some extent, by requiring procedural fairness to be afforded before such findings are made,[2] as well as imposing some minimum legal standards regarding the sufficiency of evidence and process of reasoning to support the findings.[3] However, those protections are limited. Procedural fairness merely requires

[1] *Fisher v Keane* (1879) 11 Ch D 353 at 362-363, cited in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) at 578 per Mason CJ, Dawson, Toohey and Gaudron JJ.
[2] *Ainsworth* at 578.
[3] *Mahon v Air New Zealand* [1984] 1 AC 808 at 820. *Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018; 311 ALR 750 at [35].

a fair process before findings are made, rather than a fair outcome.[4] The minimum standards regarding the sufficiency of evidence and process of reasoning to support the findings are not hard to satisfy.[5] Judicial review of findings is not equivalent to appeals. The merits of findings, their fairness, or a conclusion by a reviewing Court that the findings are wrong or involve errors of fact, are not bases for judicial interference with the findings.[6]

4. The second fundamental principle concerns the integrity of the administration of justice. Public findings by official bodies on questions the subject of proceedings that have, or may in the future be, commenced have the serious potential to prejudice those proceedings.[7] Further, it appears from the circumstances of the matter dealt with by the High Court in *Crime and Corruption Commission v Carne*,[8] that the Crime and Corruption Commission (**CCC**) has recently been employing a practice of publishing reports making critical normative judgments about individuals in circumstances where the CCC has concluded that the evidence is insufficient to warrant proceedings against those individuals for that conduct. Such a practice undermines the integrity of the administration of justice by circumventing the protections that would otherwise be available to those individuals. Those individuals are subjected to the destructive effects on their reputations caused by the CCC's findings even though the evidence is insufficient for disciplinary or criminal proceedings to be taken against them. This is perverse.

5. The third fundamental principle concerns the integrity of the democratic system of government in Queensland. There is a tendency in political discourse to describe the CCC as an "independent umpire".[9] Empowering the CCC to make public findings – especially of a normative kind – about public officials, risks making the CCC a participant in the political process, whereby its "judgment" on questions of political interest may be weaponised by political actors and become influential over electoral outcomes and government decision-making.

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[4] *Minister for Immigration and Multicultural Affairs, Re; Ex parte Lam* (2003) 214 CLR 1 at [67].
[5] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356; *Drumgold v Board of Inquiry – Criminal Justice System (No 3)* [2024] ACTSC 58 at [358]-[361].
[6] *Waterford v Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J.
[7] *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635 (***Balog***).
[8] (2023) 97 ALJR 737 (***Carne***).
[9] See, for example, the Hon. Di Farmer, Member for Bulimba, Hansard, page 2872, 18 September 2019.

6. The questions that then arise in this context are whether, in what circumstances, and subject to what constraints, the CCC should be empowered to make public findings about individuals, and whether such power should be granted retrospectively.

7. It is respectfully submitted that the answer to these questions are as follows.

8. **Firstly**, the CCC should not be empowered to make public findings that particular individuals have committed criminal offences, conduct warranting discipline or corrupt conduct. It should only have power to make any other findings against individuals after public inquiry. It should not be permitted to express opinions in public statements about whether particular individuals have committed criminal offences or corrupt conduct. It should not express opinions about the conduct of particular individuals except to the extent that those opinions are contained in public reports permitted in the circumstances described in this paragraph.

9. **Secondly**, any power to make findings about individuals should be subject to an adequate right of review or appeal to the Supreme Court or a statutory tribunal constituted by either a serving or retired Supreme Court judge. Such a right should not be confined to the limited bases for challenge available by way of judicial review. In addition to those bases, the findings of the CCC should be capable of challenge on the ground that those findings could not reasonably be supported by the evidence. It could not seriously be thought that there is a public interest in the CCC having power to make public findings destructive of the reputations of individuals which could not reasonably be supported by the evidence. Further, the availability of appeal against such findings can only enhance public confidence in the CCC and the rigour applied by the CCC when making findings.

10. **Finally**, it is submitted that power to make findings about individuals should not be granted retrospectively. Past findings of the CCC have not been subject to express statutory protections of the kind described above. It is not in the public interest that CCC findings be published that have not been made subject to these protections. It would therefore be contrary to the public interest to retrospectively grant the CCC an ability to circumvent these protections by publishing findings that have not been subject to those protections.

11. The reasons for these submissions are set out below.

THE CC ACT

12. Section 4 of the *Crime and Corruption Act* 2001 (Qld) (**CC Act**) sets out the CC Act's main purposes to:

    a. combat and reduce the incidence of major crime, and

    b. continuously improve the integrity of and reduce corruption in the public sector.[10]

13. These 'main purposes' are to be achieved primarily by establishing a permanent commission (the CCC).[11] It is to have investigative powers not ordinarily available to the police service that will enable the CCC to effectively investigate major crime and criminal organisations and their participants.[12]

14. The CCC is also to investigate cases of corrupt conduct, particularly more serious cases of corrupt conduct and help units of public administration to deal effectively and appropriately with corruption by increasing their capacity to do so[13].

15. The CCC has four categories of functions: "Prevention" (Pt 1 of Ch 2); "Crime" (Pt 2 of Ch 2); "Corruption" (Pt 3 of Ch 2) and "Research, Intelligence, and other functions" (Pt 4 of Ch 2).[14]

16. The CCC's corruption functions are both general and specific in nature. Its general functions include raising standards of integrity in conduct in units of public administration.[15] Its specific functions concern specific allegations of corrupt conduct as well as:

    a. conduct liable to allow, encourage or cause corrupt conduct; and

    b. conduct connected with corrupt conduct.[16]

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[10] *Carne* at [41], [43].
[11] *Crime and Corruption Act 2001* (Qld) (**CC Act**), s. 5(1).
[12] CC Act, s. 5(2).
[13] CC Act, s. 5(3).
[14] *Carne* at [81] per Gordon and Edelman JJ.
[15] CC Act, s. 33(1)(a).
[16] CC Act, s. 33(2).

17. As to its specific corrupt conduct functions, the CCC's functions include both itself investigating, as well as supervising investigations by other agencies, of allegations of corrupt conduct.[17]

18. The CCC's supervisory function includes the power to assume responsibility for and complete an investigation being undertaken by another agency.[18]

19. Corrupt conduct is defined by s. 15 of the CC Act as follows:

> "**15 Meaning of corrupt conduct**
>
> (1) Corrupt conduct means conduct of a person, regardless of whether the person holds or held an appointment, that—
>
> (a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of—
>
> (i) a unit of public administration; or
>
> (ii) a person holding an appointment; and
>
> b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—
>
> (i) is not honest or is not impartial; or
>
> (ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or
>
> (iii) involves a misuse of information or material acquired in or in connection with the performance

[17] CC Act, ss. 35 and 46.
[18] Ibid.

of functions or the exercise of powers of a person holding an appointment; and

(c) would, if proved, be—

(i) a criminal offence; or

(ii) a disciplinary breach providing reasonable grounds for terminating the person's services if the person is or were the holder of an appointment.

(2) Corrupt conduct also means conduct of a person, regardless of whether the person holds or held an appointment, that—

(a) impairs, or could impair, public confidence in public administration; and

(b) involves, or could involve, any of the following—

(i) collusive tendering;

(ii) fraud relating to an application for a licence, permit or other authority under an Act with a purpose or object of any of the following (however described)—

(A) protecting health or safety of persons;

(B) protecting the environment;

(C) protecting or managing the use of the State's natural, cultural, mining or energy resources;

(iii) dishonestly obtaining, or helping someone to dishonestly obtain, a benefit from the payment or application of public funds or the disposition of State assets;

(iv) evading a State tax, levy or duty or otherwise fraudulently causing a loss of State revenue;

(v) fraudulently obtaining or retaining an appointment; and

(c) would, if proved, be—

(i) a criminal offence; or

(ii) a disciplinary breach providing reasonable grounds for terminating the person's services if the person is or were the holder of an appointment."

20. In the execution of its functions, the CCC may exercise coercive powers in undertaking an investigation into alleged corrupt conduct. It has powers of entry and seizure,[19] and powers to require statements, documents or other things, and to require the attendance of witnesses at hearings to give evidence.[20]

21. Whilst public interest immunity and legal professional privilege provide grounds to resist production of things or answers to questions, privilege against self-incrimination is not a basis upon which such production or answers may be refused.[21] However, documents or answers subject to claims of self-incrimination privilege may not be used in civil, criminal, or administrative proceedings against the individual producing the documents or answering the questions.[22]

22. The CCC is empowered to hold hearings in the performance of its functions.[23] Generally, hearings are not to be open to the public.[24] For corruption investigations, hearings may be in public if the CCC considers that closing the hearing to the public would be unfair to a person or contrary to the public interest.[25]

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[19] CC Act, s. 73.
[20] CC Act, ss. 75 and 82; *Carne* at [41].
[21] CC Act, s. 75(5), definition of "privilege" in Schedule 2, ss. 188, 191 and 192.
[22] CC Act, s. 197.
[23] CC Act, s. 176.
[24] CC Act, s. 177(1).
[25] CC Act, s. 177(2).

THE CCC'S POWERS TO REPORT AND TAKE OTHER ACTION FOLLOWING ITS INVESTIGATIONS

23. The CCC has a specific power to commence disciplinary proceedings against current and former police officers and public servants in the Queensland Civil and Administrative Tribunal.[26] The only other specific power conferred by the CC Act on the CCC to take action following a corruption investigation is that which is conferred by s. 49 of the CC Act. That section provides:

> "**49 Reports about complaints dealt with by the commission**
>
> (1) This section applies if the commission investigates (either by itself or in cooperation with a public official), or assumes responsibility for the investigation of, a complaint about, or information or matter involving, corruption and decides that prosecution proceedings or disciplinary action should be considered.
>
> (2) The commission may report on the investigation to any of the following as appropriate—
>
> (a) a prosecuting authority, for the purposes of any prosecution proceedings the director or other authority considers warranted;
>
> (b) the Chief Justice, if the report relates to conduct of a judge of, or other person holding judicial office in, the Supreme Court;
>
> (c) the Chief Judge of the District Court, if the report relates to conduct of a District Court judge;
>
> (d) the President of the Childrens Court, if the report relates to conduct of a person holding judicial office in the Childrens Court;

[26] CC Act, ss. 50 and 219I.

(e) the Chief Magistrate, if the report relates to conduct of a magistrate;

(f) the chief executive officer of a relevant unit of public administration, for the purpose of taking disciplinary action, if the report does not relate to the conduct of a judge, magistrate or other holder of judicial office.

(3) If the commission decides that prosecution proceedings for an offence under the Criminal Code, section 57 should be considered, the commission must report on the investigation to the Attorney-General.

(4) A report made under subsection (2) or (3) must contain, or be accompanied by, all relevant information known to the commission that—

(a) supports a charge that may be brought against any person as a result of the report; or

(b) supports a defence that may be available to any person liable to be charged as a result of the report; or

(c) supports the start of a proceeding under section 219F or 219G against any person as a result of the report; or

(d) supports a defence that may be available to any person subject to a proceeding under section 219F or 219G as a result of the report.

(5) In this section-

prosecuting authority does not include the director of public prosecutions.

24. The history of the CCC, and its predecessors, reveals that the ambit of those bodies' powers following their investigations has been contentious. The central issue has been

the tension between the roles of investigator, prosecutor and adjudicator in corruption matters.

25. The Criminal Justice Commission (the **CJC**) was first established in 1989, effectively to continue the work of the Fitzgerald Inquiry.[27] At its inception, the CJC had the power to determine allegations of official misconduct against police officers.[28] That function was however removed from the CJC by the *Misconduct Tribunals Act 1997* (Qld), under which the function was to then be performed by Misconduct Tribunals that were to be independent of the CJC. This change was made with bipartisan support.[29] In his second reading speech, the then Minister who introduced the amending Bill said that the purpose of the Bill was "to correct a fundamental flaw in the Criminal Justice Act 1989" by reason that the then Misconduct Tribunals formed part of the Misconduct Division of the CJC which was "responsible for the investigation of misconduct".[30] The Minister noted that separation of the Misconduct Tribunals from the CJC had been recommended as early as 1991 by the Parliamentary Criminal Justice Committee, which had then been chaired by Peter Beattie.[31]

26. More recently, the tension between the roles of investigator, prosecutor and adjudicator in corruption matters was examined by the Commission of Inquiry relating to the Crime and Corruption Commission. That Inquiry followed the unsuccessful prosecution commenced by police officer seconded to the CCC of Logan City councillors. One issued examined by the Inquiry was s. 49(5) of the CC Act, which excludes the Director of Public Prosecutions (**DPP**) from the meaning of "prosecuting authority" in s. 49. In consequence of that exclusion, the DPP is not an entity that may receive a report from the CCC under that section at the conclusion of a corruption investigation. As the CCC Inquiry report noted, the consequence was that the CCC had a longstanding practice of referring matters to sworn police officers seconded to the CCC to commence prosecutions following its investigations.[32] This gave rise to concerns about the impact on the perceived impartiality and independence of decisions to commence prosecutions,

[27] Commission of Inquiry relating to the Crime and Corruption Commission, final report, 9 August 2022, (**CCC Inquiry Report**) page 32.
[28] CCC Inquiry Report, page 34.
[29] CCC inquiry Report, page 34, *Hansard*, 28 October 1997, p 3872.
[30] *Hansard*, 7 October 1997, p 3602.
[31] *Hansard*, 7 October 1997, p 3602.
[32] CCC Inquiry Report, page 112.

and public confidence in those decisions.[33] The report of the Inquiry therefore recommended that, in general, prosecutions following investigations only commence after advice from the DPP is first obtained and that s. 49 of the CC Act be amended to give effect to that recommendation.[34] This recommendation has not yet been implemented, although a report on the progress on implementation of the recommendations of the CCC Inquiry Report by the CCC dated 8 December 2023 foreshadowed[35] an amending Bill will be introduced in early 2024.

THE COMMISSION'S OTHER REPORTING POWERS

27. In addition to the specific power relating to reports following an investigation into a complaint dealt with by the CCC, is the general power to make reports under s. 64. That section provides:

> "**64 Commission's reports—general**
>
> (1) The commission may report in performing its functions.
>
> (2) The commission must include in each of the reports—
>
> (a) any recommendations, including, if appropriate and after consulting with the commissioner of police, a recommendation that the Police Minister give a direction to the commissioner of police under the Police Service Administration Act, section 4.6; and
>
> (b) an objective summary of all matters of which it is aware that support, oppose or are otherwise relevant to its recommendations.
>
> (3) If the Police Minister decides not to give a direction under the Police Service Administration Act, section 4.6 following a recommendation made under subsection (2)(a), the Police

[33] CCC Inquiry Report, pages 113-114 and 130.
[34] CCC Inquiry Report, pages 131-132.
[35] Implementation and delivery of COI recommendations, Quarterly report number 5, 8 December 2023, page 14.

Minister must table in the Legislative Assembly, after giving the reasons—

(a) a copy of the recommendation; and

(b) the Minister's reasons for not giving the direction.

(4) The commission may also include in a report any comments it may have on the matters mentioned in subsection (2)(b).

(5) In this section—

Police Minister means the Minister administering the Police Service Administration Act.

Police Service Administration Act means the *Police Service Administration Act 1990*."

28. The above section states that the CCC may report in performing its functions. As already noted, those functions are widely described in the CC Act, including Intelligence and Research-related functions.

29. Section 69 provides:

"**69 Commission reports to be tabled**

(1) This section applies to the following commission reports—

(a) a report on a public hearing;

(b) a research report or other report that the parliamentary committee directs be given to the Speaker.

(2) However, this section does not apply to the commission's annual report, or a report under section 49 or 65, or a report to which section 66 applies.

(3) A commission report, signed by the chairperson, must be given to—

(a) the chairperson of the parliamentary committee; and

(b) the Speaker; and

(c) the Minister.

(4) The Speaker must table the report in the Legislative Assembly on the next sitting day after the Speaker receives the report.

(5) If the Speaker receives the report when the Legislative Assembly is not sitting, the Speaker must deliver the report and any accompanying document to the clerk of the Parliament.

(6) The clerk must authorise the report and any accompanying document to be published.

(7) A report published under subsection (6) is taken, for all purposes, to have been tabled in and published by order of the Legislative Assembly and is to be granted all the immunities and privileges of a report so tabled and published.

(8) The commission, before giving a report under subsection (1), may—

(a) publish or give a copy of the report to the publisher authorised to publish the report; and

(b) arrange for the prepublishing by the publisher of copies of the report for this section."

30. As can be seen above, Section 69 expressly excludes from its operation a report produced under section 49 or 65,[36] or a report to which section 66 applies.[37] Thus, a report about a CCC corruption investigation to an entity, other than the DPP, made to that entity because the CCC considers prosecution or disciplinary proceedings are warranted, is expressly excluded from the ambit of reports that may be tabled under s.

[36] A report about procedures and operations of a state court or its registry or administrative offices.
[37] Reports containing information that the CCC considers should be subject to maintenance of strict confidentiality.

69. However, there is no express exclusion for reports about investigations that lead to criminal prosecutions commenced by sworn police officers, disciplinary proceedings commenced by the CCC[38] or where the CCC concludes that no criminal or disciplinary proceedings should be commenced because the CCC considers that the evidence is insufficient to do so.

31. The other point of note is that s. 69(1)(a) expressly provides that reports of public hearings of the CCC are to be tabled. No direction from the Speaker is required in order for that to occur.

CARNE

32. The High Court decision in *Carne* concerned a report by the CCC about the former Public Trustee of Queensland. The CCC had originally recommended, as a result of its investigation, in that matter that the Attorney-General consider whether Mr Carne had engaged in "misbehaviour" while public trustee.[39] The CCC had determined that it would not commence criminal proceedings against Mr Carne.[40] The Attorney-General terminated consideration of disciplinary action against Mr Carne after Mr Carne resigned.[41] The CCC then composed a report about its investigation.[42] The report contained the allegations against Mr Carne that had led to the CCC investigation and a foreword which would be understood to be directed to Mr Carne and highly critical of him.[43] It did not specifically make findings of corrupt conduct against Mr Carne.[44] The CCC resolved to seek a direction from the parliamentary committee under s. 69(1)(b) of the CC Act that the report be given to the Speaker. In a private meeting with the Chair of the parliamentary committee, the Chair of the CCC advised that the reason for the preparation of the report was because "it is high profile and it has been in the media".[45] The Chair of the CCC said that after the disciplinary process against Mr

[38] Under s. 50.
[39] *Carne* at [4].
[40] *Carne* at [6].
[41] *Carne* at [7].
[42] *Carne* at [7].
[43] *Carne* at [13].
[44] *Carne* at [13].
[45] *Carne* at [8].

Carne had taken its course, the CCC "probably should articulate some of the concerns that [it] had".[46]

33. All members of the High Court agreed that the CCC's reporting power in s. 64 of the CC Act did not include within its ambit, power to make reports on a particular investigation into alleged corrupt conduct on the part of individuals.[47] The reasoning by the various members of the Court focussed on textual considerations found in the CC Act as well as principles of statutory interpretation which are aimed at ensuring the conditions and limitations on specific powers are not circumvented by the use of more general powers that are not subject to those conditions and limitations.[48]

34. The immediate relevance of the decision of the High Court in *Carne* to this review is that it is in consequence of that decision that the questions posed for this review have been asked. It is in consequence of that decision that it is now established that the CCC does not have power to publicly make findings about individuals in reports about investigations of alleged corrupt conduct.

35. The reasoning of the High Court, and the underlying factual circumstances, in *Carne* also highlight the uncomfortable policy issues that confront this review. In particular, how can it be in the public interest to confer on a public body the power to make public findings about an individual that have the potential to destroy that individual's career and livelihood which are only susceptible to challenge on the limited bases provided by judicial review and where the CCC, or another independent body, has concluded that there is no basis to take criminal or disciplinary proceedings against that individual?

36. This question falls to be answered in the context of the historical tension between the roles of investigator, prosecutor and adjudicator that the CCC, and its predecessors, have variously occupied since the Fitzgerald Inquiry. A power of reporting, such as that contemplated by the terms of reference of this Review, would place the CCC in the position of investigator, prosecutor and adjudicator over allegations which have profound impacts on the reputations of public officials.

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[46] *Carne* at [8].
[47] *Carne* at [68] and [104].
[48] *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7. See *Carne* at [66].

37. In part, the answer to the above question requires an examination of the history of the CCC's use of public reporting and a comparison with other Australian Integrity bodies.

THE HISTORY OF THE CCC'S USE OF PUBLIC REPORTING

The Shepherdson Inquiry

38. A notable early example of public reporting by a predecessor to the CCC was the Shepherdson Inquiry report. That was a report delivered in April of 2001 after an investigation by the CJC. What is particularly notable about the report is that it contains no findings against anyone. At page XIII of the report is this statement:

> The purpose of this Inquiry was not to determine guilt. Rather, it was to gather information regarding the allegations made that fell within the terms of reference. It then had to decide whether any of this information contained admissible evidence – that is, evidence that should be referred by the CJC to a prosecuting authority for consideration of charges against any people.

39. The balance of the Shepherdson Inquiry report then contained a detailed analysis of evidence, heard by the CJC after a determination that the Inquiry be heard in public,[49] in which no findings are made against any person. Instead, the analysis in the report is of the sufficiency of the evidence to warrant prosecution or other proceedings against persons.[50] The report also contains various comments and observations about possible improvements in the law that might be made in consequence of the issues that had been revealed by the evidence.[51]

The Public Duty, Private Interests Report

40. The next notable example of a public report by a predecessor of the CCC is the Crime and Misconduct Commission's (**CMC**) report entitled "Public Duty, Private Interests" dated December 2008. That report concerned the conduct of a former Director-General of a Queensland Government Department. That conduct was to use his position, whilst

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[49] Shepherdson Inquiry report, page 8.
[50] See for example pages 40 ("If accepted by a jury, the evidence is capable of proving"), page 44 ("If I conclude that Kehoe's evidence…is so inherently incredible that no reasonable person could accept it then I shall not recommend that the matter…be referred to the Commonwealth Director of Public Prosecutions"), page 75 ("I conclude that…Kehoe's evidence [is not] so inherently incredible that no reasonable person could accept it as true").
[51] Shepherdson Inquiry report at page 163.

still an employee of the State, to advance the interests of a private company whom he was considering working for upon the completion of his employment. Because the Director-General's employment had terminated by the time that the allegations had come to light, he was, under the legislation then existing, not amenable to disciplinary action.[52] The CMC determined, however, to conduct a joint investigation with the Department which had employed the Director-General due to "the role of the CMC to build capacity in units of public administration".[53]

41. Similarly, to the Shepherdson Inquiry report, the "Public Duty, Private Interests" report contains no findings that the Director-General in question had engaged in "official misconduct".[54] It did, however, go further than the Shepherdson Inquiry report by making findings against the Director-General in question. Despite concluding that the evidence was insufficient to prove a criminal offence against him,[55] the CMC found that he had breached his own Department's code of conduct, placed himself in a position of conflict of interest, acted contrary to the public interest and created a situation where it could reasonably be perceived that he did not carry out his duties fairly or in an unbiased fashion. The report then contains a detailed discussion about recommendations for legislative reform with the purpose of creating a new offence that would enable prosecution of public servants who engage in conduct of the kind that was considered in the report.[56] Those recommendations subsequently led to the enactment of s. 92A of the *Criminal Code*.

The Operation Belcarra Report

42. The final example of the use of public reporting by the CCC, to which these submissions make reference, is the CCC's report from its Operation Belcarra investigation. Operation Belcarra was initiated by the CCC following the Queensland local government elections in March 2016. The operation aimed to investigate allegations of corruption and to identify practices undermining public confidence in the integrity of local government. The CCC focused on issues such as undeclared groups

[52] That position has since changed. See s. 50 of the CC Act and s. 95 of the *Public Sector Act 2022* (Qld).
[53] "Public Duty, Private Interests" report page 8.
[54] At that time, the relevant Act under which the investigation was conducted was the *Crime and Misconduct Act 2001* (Qld) and the relevant type of conduct that the investigation related to was "official misconduct" as defined by that legislation.
[55] "Public Duty, Private Interests" report, page 23.
[56] "Public Duty, Private Interests" report, page 27.

of candidates, misleading electoral funding disclosures, and the failure to operate dedicated bank accounts. The CCC investigated and conducted public hearings to gather information about a number of possible criminal offences, and to canvass broader issues related to corruption and integrity in local government.

43. Various findings against individuals are contained in the report.[57] No findings were made that corrupt conduct, disciplinary breaches or criminal offences had been committed. However, the report does contain recommendations that persons be referred to other entities for further action. It also contains findings of a normative nature. For example, findings that certain disclosures "should" have been made by candidates for election and findings that individuals had breached their obligations under electoral laws.[58]

44. Based on its findings, the CCC proposed a series of recommendations to improve electoral processes and transparency. These recommendations included introducing expenditure caps, implementing real-time disclosure of electoral expenditure, requiring candidates to declare interests and notify changes, and prohibiting gifts from property developers. Other recommendations involved amendment of legislation, enhancement of disclosure requirements, penalties for non-compliance, and empowering the Electoral Commission of Queensland (ECQ) to ensure integrity and transparency in local government elections.

COMPARISON WITH OTHER AUSTRALIAN INTEGRITY BODIES

45. It is useful to consider the powers of integrity bodies within other Australian jurisdictions to identify where the limitations have been drawn in those jurisdictions.

New South Wales Independent Commission Against Corruption

Early history of ICAC

46. The Independent Commission Against Corruption (**ICAC**) was established by the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**).

[57] See, for example, *"Operation Belcarra – A blueprint for integrity and addressing corruption risk in local government"* report, pages 18-22.
[58] See, for example, pages 22 and 27 of the report.

47. Early in its history, ICAC had power to "prepare reports in relation to any matter that has been, or is the subject of, an investigation".[59] The reporting power included the following provision:

> "A report may include a statement of the Commission's findings as to whether there is or was any evidence or sufficient evidence warranting consideration of –
>
> (a) the prosecution of a specified person for a specified offence; or
>
> (b) the taking of action against a specified person for a specified disciplinary offence; or
>
> (c) the taking of action against a specified public official on specified grounds, with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official."[60]

48. The term "corrupt conduct" was defined by the Act as extending:

> "generally to any conduct of any person that adversely affects, or could adversely affect, the honest or impartial exercise of official functions, or which constitutes or involves the dishonest or partial exercise of official functions or a breach of public trust. It also includes conduct that adversely affects or could adversely affect the exercise of official functions and involves any one of a number of specified criminal offences, including bribery, blackmail, perverting the course of course of justice and the like. Nevertheless, conduct does not amount to criminal conduct unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or dispensing with the services of a public official or otherwise terminating those services."[61]

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[59] *Balog* at 630.
[60] *Balog* at 631.
[61] *Balog* at 628.

Balog

49. In *Balog*, the High Court held that ICAC was not entitled to include in any report a statement of any finding by it that a person was, or may have been, guilty of a criminal offence or corrupt conduct. It held that the only finding that ICAC could properly make concerning criminal liability was that referred to in s. 74(5), quoted above, namely "whether there is or was any evidence, or sufficient evidence, warranting consideration of the prosecution of a specified person for a specified offence".[62] It arrived at this conclusion on two bases, namely:

a. a textual analysis of the legislation establishing ICAC; and

b. regard to the "principle of legality".

Textual analysis in Balog

50. As to textual analysis, the High Court held:

a. ICAC reports must contain a statement whether there is any evidence or sufficient evidence warranting consideration of the prosecution for a specified offence, however that is the extent of any statement of findings which ICAC could properly make concerning criminal liability;[63]

b. since the broad function of ICAC is to communicate the results of its investigations, it is apparent that its primary role is not that of expressing, at all events, in any formal way, any conclusions it might reach concerning criminal liability;[64]

c. the one function expressly given to ICAC which directly related to criminal proceedings was to assemble evidence that may be admissible and pass it on to the Director of Public Prosecutions or the Attorney-General, further indicating that ICAC is intended to be primarily an investigative body and not a body the purpose of which is to make determinations, however preliminary, as part of the criminal process, but also indicating how inappropriate it would be for ICAC to

[62] *Balog* at 634.
[63] Relying on the maxim that the express mention of something excludes that which is not mentioned – *expressum facit cessare tacitum*; *Balog* at 632.
[64] *Balog* at 632.

report a finding of guilt or innocence given that ICAC was permitted to proceed upon the basis of hearsay or privileged evidence;[65]

d. "It is hardly to be supposed that if the Commission were to reach a finding that there was insufficient admissible evidence to warrant a consideration of the prosecution of a specified person for a specified offence, the section nevertheless contemplates that it should go on to express a finding, upon inadmissible evidence, that the same person had committed the offence in question";[66]

e. the guarded way in which s. 74(5) was phrased, i.e., the expression in "any evidence or sufficient evidence warranting consideration", suggested that it is someone else's evaluation of the evidence which is to determine whether a person is to be prosecuted or not, and that the function of the Commission is to investigate and assemble evidence rather than to evaluate it for itself, save for the limited purpose of deciding whether it warrants further consideration;[67]

f. "At least in theory there may be a fine line between making a finding and merely reporting the results of an investigation. But in practice, the line should not be difficult to draw. It is clear enough that there is a distinction between the revelation of material which may support a finding of corrupt conduct or the commission of an offence and the actual expression of a finding that the material may or does express those matters."[68]

Reliance on principle of legality in Balog

51. The principle of legality is the principle that "insists on a manifestation of unmistakeable legislative intention for a statute to be interpreted as abrogating or curtailing a right or immunity protected by the common law or a principle recognised by the common law to be important within our system of representative and responsible government under the rule of law".[69]

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[65] *Balog* at 633.
[66] *Balog* at 633.
[67] *Balog* at 633.
[68] *Balog* at 635.
[69] *Australian Communications and Media Authority v Today FM (Sydney)* (2015) 255 CLR 352 at (***ACMA***) 381-382 [67] – [69] per Gageler J.

52. As to the principle of legality basis for its construction, the High Court held in *Balog*:

> "Whilst in our view the conclusions which we have expressed flow from the application to the Act of the ordinary principles of interpretation, we would add the following observations lest we be thought to have taken an unduly restrictive view of the Commission's functions. Although the pernicious practices at which the Act is aimed no doubt call for strong measures, it is obvious that the Commission is invested with considerable coercive powers which may be exercised in disregard of basic protections otherwise afforded by the common law. Were the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be a risk of damage to that person's reputation and of prejudice in any criminal proceedings which might follow. If the legislation admits of a wider interpretation than that which we have given to it (and we do not think that it does), then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred."[70]
>
> (citations omitted)

53. The High Court held:

> "Moreover, it is not apparent that the objects of the legislation embrace the publication of findings by the Commission, save in the two instances for which the Act expressly provides. The Commission is primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its

[70] *Balog* at 635.

functions, that it should be able to make findings against individuals of corrupt or criminal behaviour."[71]

Post-Balog amendments

54. Amendments were made to the ICAC legislation[72] two years after the High Court's decision in *Balog* to give ICAC a clear and wide power to make and report findings and opinions based on results of its investigations and to make recommendations for the taking of further action.[73] Those amendments specifically authorised ICAC to make findings that particular persons have engaged, are engaged or are about to engage in corrupt conduct.[74]

Greiner

55. *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 (***Greiner***) was decided after the legislation that amended the ICAC Act discussed above. It concerned findings made by ICAC of its investigation into the appointment of a New South Wales public servant. The public servant, Dr Metherell, was appointed to the senior executive service in the Premier's Department. The appointment was made by the Governor in Council on the recommendation of the head of the Premier's Department, Mr Humphrey. Dr Metherell was appointed to that position so that he could subsequently be seconded to the Environment Protection Authority. This was done at the request of the then Premier, Mr Greiner, who, ICAC found, made that request for a political purpose. That purpose was to secure Dr Metherell's resignation from parliament.

56. ICAC found that Greiner had engaged in corrupt conduct. The definition of corrupt conduct in the ICAC Act was very similar to the definition of corrupt conduct in the CC Act.[75] Section 8(1) of the ICAC Act defined corrupt conduct as follows:

"8(1) **Corrupt conduct is:**

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[71] *Balog* at 636. It should be noted that the High Court distinguished *Balog* in *ACMA*. See in particular 374 [42] and 381-382 [67]-[69] in *ACMA*.
[72] By the *Independent Commission Against Corruption (Amendment) Act* 1990 (NSW).
[73] *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 14 [9] (***Cunneen***).
[74] *Independent Commission Against Corruption Act* 1988 No 35 (NSW) s.13(5)(a).
[75] See s.15 of the CC Act.

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority; or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust; or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person."

57. Section 9(1) was also relevant to the definition of corrupt conduct:

"9(1) Despite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence; or

(b) a disciplinary offence; or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official."

58. In its decision, the New South Wales Court of Appeal found that ICAC had exceeded its power in concluding that Greiner had engaged in corrupt conduct. Gleeson CJ said:

"s 9(1) must be applied by the Commission, and by this Court, in a manner that is consistent with the purpose of the legislature, which was

that the standards by which it is applied must be objective standards, established and recognised by law, and its operation cannot be made to depend upon the subjective and unexaminable opinion of the Commissioner.

…

It is important to observe, as the Commissioner clearly understood, that his task, and this Court's task, is to consider the facts of the case in relation to the provisions of s 8 and s 9 of the ICAC Act. There is a big difference between an exercise of that kind and an exercise of passing moral or political judgment upon the arrangement that was made between the plaintiffs and Dr Metherell. A judgment of that kind is for Parliament and the electorate. Our concern, and the Commission's concern, is with evaluating the plaintiffs' conduct according to law, the relevant law being the ICAC Act.

…

On the true construction of s 9, the test of what constitutes reasonable grounds for dismissal is objective. It does not turn on the purely personal and subjective opinion of the Commissioner.

…

Vague and uncertain though the standards referable to the application of s 9(1)(c) to Premiers and Ministers may be, it is for the Commission to identify and apply the relevant standards, not to create them. … The observance and application by the Commission of objective standards, established and recognised by law, in the performance of its task of applying s 9 to cases before it is essential. It is what was intended by Parliament, it is required by the statute, and it is necessary for the maintenance of the rule of law."[76]

[76] *Greiner* at 143-147.

59. In the result, Gleeson CJ found that by failing to base its findings upon objective standards, established and recognised by law, ICAC made its report without or in excess of jurisdiction.[77]

60. Priestley JA agreed with Gleeson CJ for the same reasons.[78]

The Gleeson and McClintock Review

61. Following the decision of the High Court in *Independent Commission Against Corruption v Cunneen*,[79] which considered the statutory definition of "corrupt conduct" in the ICAC Act, the then New South Wales Government appointed Murray Gleeson AC (who had been one of the judges who decided the Greiner case discussed above) and Bruce McClintock to conduct a review of ICAC. Their 30 July 2015 report, entitled "Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption" contains relevant observations and recommendations regarding the powers of ICAC to report. Those observations and recommendations are detailed in these submissions.

ICAC today

62. Today, ICAC is obliged by s. 74 of the ICAC Act to prepare reports of its public inquiries and in relation to matters referred to it by both Houses of Parliament, as directed by those Houses. That same section also confers upon ICAC a discretion to prepare reports in relation to other matters investigated by ICAC. The section requires ICAC to furnish the reports that it prepares, to Parliament.

63. ICAC's reports may include findings, opinions and recommendations, and the reasoning underpinning those matters.[80] They must also include statements about whether consideration should be given to taking advice from the New South Wales DPP as to potential prosecution and the taking of disciplinary action against public servants.[81] However, the reports may not include findings that persons are guilty of offences or recommendations that prosecutions or disciplinary action be taken against

[77] *Greiner* at 149.
[78] *Greiner* at 166G to 167D, 181D.
[79] (2015) 318 ALR 391.
[80] ICAC Act, s. 74A.
[81] ICAC Act, s. 74A.

persons.[82] Further, they may only include findings that persons have engaged in corrupt conduct if the corrupt conduct is "serious".[83] This last requirement is a product of a recommendation of the Gleeson and McClintock review.[84] The term "serious corrupt conduct" is not defined by the ICAC Act.

Victoria Independent Broad-based Anti-corruption Commission

64. The Independent Broad-based Anti-Corruption Commission (**IBAC**) is established under the *Victoria Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (**IBAC Act**).

65. As set out by the High Court in the recent decision of *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission*:[85]

> The objects of the IBAC Act and the functions of IBAC include the identification, investigation and exposure of corrupt conduct[86], assisting in the prevention of such conduct[87] and assisting in improving the capacity of the public sector to prevent such conduct[88]. The definition of "corrupt conduct" is extensive, but it suffices to state that it includes conduct of a public officer or public body that constitutes the dishonest performance of their functions[89] or conduct of any person that adversely affects the honest performance of those functions,[90] provided that such conduct constitutes a "relevant offence" (which includes any indictable offence committed against an Act).[91] IBAC's functions also include reporting on, and making recommendations as a result of, the performance of its duties and functions.[92]

[82] ICAC Act, s. 74B.
[83] ICAC Act, s. 74BA.
[84] See the report of that review page 64 [9.6.6].
[85] [2024] HCA 10 (***AB v IBAC***) at [14]
[86] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act), ss. 8(a)(i), 15(2)(a).
[87] IBAC Act, ss. 8(b)(i), 15(5)-(6).
[88] IBAC Act, ss. 8(d), 15(6)(c)
[89] IBAC Act, s. 4(1)(b).
[90] IBAC Act, s. 4(1)(a).
[91] IBAC Act, ss. 3(1), 4(1).
[92] IBAC Act, s. 15(7)(b).

66. IBAC may conduct a preliminary inquiry for the purpose of determining whether to dismiss, refer or investigate a complainant or notification made under the IBAC Act.[93]

67. Other than in very limited circumstances, witness examinations are not open to the public, and only the witness, the legal representatives of the witness and IBAC and such other persons that IBAC or the IBAC Act has directed or authorised to attend, may be present during the examination.[94]

68. IBAC's power to report is contained within Part 7 of the IBAC Act. Section 162 provides a power for IBAC to, at any time, cause a report to be transmitted to each House of Parliament on any matter relating to the performance of its duties and functions. Section 162 of the IBAC Act provides that if IBAC intends to include in a report a "comment or opinion" adverse to any person, then IBAC must first provide that person with a reasonable opportunity to respond to the "adverse material" and fairly set out each element of the response in its report.[95] The section prohibits IBAC from including in the report anything that might prejudice extant criminal or other proceedings. It also prohibits IBAC from making findings that any person has committed a crime or disciplinary offence.

69. At the time of writing this submission, a Bill is being debated in Victorian Parliament which aims to expand IBAC's ability to publicly report on recommendations relating to matters of an institutional nature.[96]

70. In the second reading speech, reference was made to the comments of former Court of Appeal judge and former IBAC Commissioner the Honourable Robert Redlich AM KC who reiterated his views in relation to s. 169(2) of the IBAC Act on 31 July 2023 at a hearing of the Victorian Parliament's Integrity and Oversight Committee (IOC):[97]

> … there is currently a deficiency in the IBAC Act … in that the only recommendations of IBAC which can be published are those which are made in a special report which is tabled in Parliament. IBAC does not table more than

[93] IBAC Act, s. 59A.
[94] IBAC Act, s. 117(1)-(3); *AB v IBAC* at [16].
[95] Considered by the High Court in *AB v IBAC*.
[96] Second Reading, David Davies (LIB), Independent Broad-Based Anti-Corruption Commission Amendment (Public Recommendations) Bill 2023.
[97] Second Reading, David Davies (LIB), Independent Broad-Based Anti-Corruption Commission Amendment (Public Recommendations) Bill 2023.

> two or three reports a year, but we write countless outcome letters to councils and departments at the end of an investigation, in which we identify failings and we set out recommendations. It would be really important that the legislation is amended to reflect the need to be able to publish those recommendations. I do not suggest, if we are talking about recommendations concerning individuals, that recommendations should be published. I am talking about recommendations that identify institutional failings. It makes I think good sense that the community should be alive to recommendations that address institutional failings and are aware of them, and that encourages in turn public discussion about those sorts of things.

71. The apparent object of the Bill is to give IBAC the discretion to better realise its educational objectives by permitting the publication of recommendations of an institutional nature without commenting on or providing an opinion which is adverse to a person. It is noteworthy that former IBAC Commissioner the Honourable Robert Redlich AM KC considered that those objectives could be achieved by publishing recommendations, to address institutional failings, without naming individuals.

South Australia Independent Commissioner Against Corruption

72. As a result of 2021 amendments to *the Independent Commissioner Against Corruption Act* 2012 (**ICAC Act (SA)**), the South Australian Independent Commissioner can no longer send a brief of evidence directly to the DPP.[98] The brief must now be referred to "the relevant law enforcement agency" (usually South Australia Police) for further investigation and potential prosecution.

73. The Commissioner can only investigate a matter, if it is referred to it, of potential corruption.

74. Proceedings are heard in private unless subject to an order of the court or judicial officer concerned to the contrary.[99]

75. The Commissioner has the authority to recommend to an agency or public authority that the agency or authority change or review practices in a specific way or conduct

[98] ICAC Act (SA) s. 36.
[99] ICAC Act (SA) s. 55.

educational programs to achieve specified outcomes.[100] If a recommendation is made, the Commissioner must report the recommendations to Parliament.[101]

76. The Commissioner may make a public statement in connection with a particular matter if, in the Commissioner's opinion, it is appropriate to do so in the public interest, having regard to the following:[102]

    a. the benefits that might be derived from making the statement;

    b. whether the statement is necessary in order to allay public concern or to prevent or minimise the risk of prejudice to the reputation of a person;

    c. the risk of prejudicing the reputation of a person by making the statement;

    d. if an allegation against a person has been made public and, in the opinion of the Commissioner following an investigation or consideration of a matter under this Act, the person is not implicated in corruption, misconduct or maladministration in public administration—whether the statement would redress prejudice caused to the reputation of the person as a result of the allegation having been made public;

    e. whether any person has requested that the Commissioner make the statement.

77. The Commissioner may prepare a report which sets out findings or recommendations from completed investigations,[103] or other matters that arise in the course of the performance of the Commissioner's functions that the Commissioner considers to be in the public interest to disclose.[104] However, pursuant to s 42(1a), the Commissioner must not:

    a. prepare a report under this section setting out findings or recommendations resulting from a completed investigation into a potential issue of corruption in public administration unless:

[100] ICAC Act (SA) s. 41(1).
[101] ICAC Act (SA) s. 41(2).
[102] ICAC (SA) s. 25.
[103] ICAC (SA) s. 42(1)(b).
[104] ICAC (SA) s. 42(1)(c).

i. all criminal proceedings arising from that investigation are complete; or

ii. the Commissioner is satisfied that no criminal proceedings will be commenced as a result of the investigation, in which case the report must not identify any person involved in the investigation; or

b. prepare a report under this section that includes any findings or suggestions of criminal or civil liability and must not include any findings that, if proved to the requisite standard by a court, would constitute a criminal offence or civil wrong.

78. A copy of a report setting out findings or recommendations resulting from completed investigations in respect of matters raising potential issues of corruption in public administration must be provided to the public authorities responsible for any public officer to whom the report relates, and to the Minister responsible for that public authority, and in any case—to the Attorney-General, the President of the Legislative Council and the Speaker of the House of Assembly.[105]

79. The President of the Legislative Council and the Speaker of the House of Assembly must, on the first sitting day after 28 days (or such shorter number of days as the Attorney-General approves) have passed after receiving a report, lay it before their respective Houses.[106]

Western Australia Corruption and Crime Commission

80. The main purposes of the *Corruption, Crime and Misconduct Act* (the **CCM Act**) are "to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector."[107]

81. The purposes of the CCM Act are to be achieved primarily by establishing the Western Australian equivalent of the CCC. The Act's purpose in relation to misconduct is to be achieved by conferring functions on the CCC and the Public Sector Commissioner.[108] Section 7B(4) provides that the Commission is to be able to investigate cases of "serious

[105] ICAC (SA) s. 42(2).
[106] ICAC (SA) s. 42(3).
[107] CCM Act 2003 (WA) s. 7A.
[108] CCM Act 2003 (WA) s. 7B.

misconduct", which is in turn defined in s 3 of the CCM Act to mean "misconduct of a kind described in s 4(a), (b) or (c); or police misconduct".

82. As identified in the decision of *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223, the CCC may:[109]

> …make 'assessments and form opinions' as to whether serious misconduct has or may have occurred, is or may be occurring, is or may be about to occur or is likely to occur. Such assessments and opinions may be made on the basis of investigations conducted by the CCC.[110] The CCC may also make recommendations as to whether consideration should be given to the prosecution of particular persons or the taking of disciplinary action against particular persons or whether other action should be taken in relation to the subject matter of its assessments or opinions or the results of its investigations.[111]

83. The Commission in Western Australia can prepare a report to Parliament at any time on any matter that has been the subject of an investigation or other action in respect of serious misconduct, irrespective of whether the investigation or action was carried out by the Commission alone, the Commission in cooperation with an independent agency or appropriate authority, or an appropriate authority alone.[112]

84. Such a report may contain statements and reasons as to any of the Commission's assessments, opinions and recommendations.[113] A report prepared under s. 84 of the CCM Act may be laid before each House of Parliament or dealt with by laying documents before a House of Parliament that is not sitting.[114]

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[109] *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [108].
[110] CCM Act 2003 (WA) s. 22.
[111] CCM Act 2003 (WA) s. 43.
[112] CCM Act 2003 (WA) s. 84(1).
[113] CCM Act 2003 (WA) s. 84(3).
[114] CCM Act 2003 (WA) s. 93.

85. Before reporting any matters adverse to a person or body in a report under s. 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.[115]

Tasmania Integrity Commission

86. The object of the *Integrity Commission Act 2009* (TAS) (**IC Act**) is to promote and enhance standards of ethical conduct by public officers by the establishment of an Integrity Commission.[116]

87. The objectives of the Commission are to:[117]

a. improve the standards of conduct, propriety and ethics in public authorities in Tasmania; and

b. enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and

c. enhance the quality of, and commitment to, ethical conduct by adopting a strong educative preventative and advisory role.

88. The Commission may, of its own initiative, investigate any matter related to misconduct,[118] and may gather evidence for the prosecution of persons for offences or proceedings as to a breach of a code of conduct or proceedings under any Act.[119]

89. Investigations are to be conducted in private unless otherwise authorised by the chief executive officer (**CEO**).[120]

90. Upon receiving a complaint, the Commission's CEO may dismiss it, accept it for assessment, refer it to an appropriate person for action, or recommend that a commission of inquiry be established in relation to it.[121]

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[115] CCM Act 2003 (WA) s. 86.
[116] ICA 2009 (TAS) s. 3(1).
[117] ICA 2009 (TAS) s. 3(2)
[118] ICA 2009 (TAS) s. 8(1)(j).
[119] ICA 2009 (TAS) s. 8(m).
[120] ICA 2009 (TAS) s. 48.
[121] ICA 2009 (TAS) s. 35(1).

91. If the CEO accepts a complaint for assessment, the CEO is to appoint an assessor to assess whether the complaint should be accepted for investigation.[122] In conducting an assessment the assessor may exercise any of the powers of an investigator under Part 6 of the IC Act, if the assessor considers it is reasonable to do so.[123]

92. On completion of an investigation, the investigator is to prepare a report of findings for the chief executive officer, who is in turn to submit a report of the investigation to the Board.[124]

93. Before finalising any report for submission to the Board, the CEO may, if they consider it appropriate, give a draft of the report to the principal officer of the relevant public authority, the public officer who is the subject of the investigation, and any other person who in the CEO's opinion has a special interest in the report.[125] A notice may be attached to a draft of a report specifying that the draft of the report is a confidential document. [126]

94. A person given a draft report may give the CEO written submissions or comments in relation to the draft of the report within such time and in such a manner as the CEO directs.[127] The CEO must include any submissions or comments given to the CEO, or a fair summary of those submissions or comments in a report given to the Board of the Integrity Commission.[128]

95. A complaint can be dismissed, referred for further action, or referred for inquiry.[129]

96. If an inquiry is to be conducted, the Chief Commissioner is to convene an Integrity Tribunal.[130] The Tribunal may then either dismiss the complaint, make a finding that misconduct or serious misconduct has occurred, recommend to the Premier that a commission of inquiry be established, make such report as it considers appropriate and

[122] ICA 2009 (TAS) s. 35(2).
[123] ICA 2009 (TAS) s. 35(4).
[124] ICA 2009 (TAS) s. 55.
[125] ICA 2009 (TAS) s. 56(1)(a)-(c).
[126] ICA 2009 (TAS) s. 56(1)-(2).
[127] ICA 2009 (TAS) s. 56(1)-(3).
[128] ICA 2009 (TAS) s. 57.
[129] ICA 2009 (TAS) s. 57.
[130] ICA 2009 (TAS) s. 60.

refer the matter to another appropriate authority for further action.[131] The determination is reviewable under the *Judicial Review Act 2000* (TAS).[132]

97. The Integrity Commission may, at any time, lay before each House of Parliament a report on any matter arising in connection with the performance of its functions or exercise of its powers.[133]

Australian Capital Territory Integrity Commission

98. The ACT Integrity Commission (**ACT IC**) is established by the *Integrity Commission Act 2018* (ACT). The objects of the Act include, inter alia:[134]

a. identifying, investigating, and exposing corrupt conduct;

b. prioritising the investigation and exposure of serious corrupt conduct and systemic corrupt conduct;

c. achieving a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation;

d. cooperating with other integrity bodies and assisting in the prevention of corrupt conduct;

e. educating public officials and the community about the detrimental effects of corrupt conduct on public administration and the community and the ways in which corrupt conduct can be prevented;

f. assisting in improving the capacity of the public sector to prevent corrupt conduct.

99. As an investigation report or special report must be provided to the Legislative Assembly,[135] and an investigation report must be published on the ACTIC website,[136]

[131] ICA 2009 (TAS) s. 78.
[132] ICA 2009 (TAS) s. 79.
[133] ICA 2009 (TAS) s. 11.
[134] *Integrity Commission Act* 2018 (ACT) s. 6.
[135] *Integrity Commission Act* 2018 (ACT) ss 189, 206.
[136] *Integrity Commission Act* 2018 (ACT) s 190. Note that this section does not apply to a confidential investigation report.

the findings, opinions and recommendations of the ACTIC may be made publicly available at the conclusion of an investigation. Adverse findings about a person or entity may be included in the investigation report.

Northern Territory Independent Commissioner Against Corruption

100. The Northern Territory Independent Commissioner Against Corruption (**NT ICAC**) is established by the *Independent Commissioner Against Corruption Act 2017* (NT) (the **NT ICAC Act**). The functions and powers of the NT ICAC were discussed in the Northern Territory Supreme Court decision in *Moriarty v Independent Commissioner Against Corruption (NT)*.[137]

101. NT ICAC is established by s 17 of the NT ICAC Act. Under s 18, the NT ICAC is conferred with the functions of identifying and investigating improper conduct;[138] protecting people who have assisted or may assist in detecting, preventing, investigating, or otherwise responding to improper conduct;[139] preventing, detecting, and responding to improper conduct by a range of means including making public comment;[140] overseeing how matters are dealt with by entities to which the NT ICAC has referred matters;[141] and performing functions conferred on the NT ICAC by another Act.[142] The NT ICAC may perform functions under the NT ICAC Act in relation to any matter that may involve improper conduct. Subject to the NT ICAC Act, the NT ICAC may perform the NT ICAC's functions in any manner the NT ICAC considers appropriate.

102. By s 19 of the NT ICAC Act, the NT ICAC may do "all things necessary or convenient" to be done for or in relation to, the performance of the NT ICAC's functions.

103. Section 20 provides that if the NT ICAC has a discretion in performing a function under the NT ICAC Act, the NT ICAC is to act in the public interest, taking into account the matters set out in Schedule 1 that the NT ICAC considers relevant and appropriate in any particular case.

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[137] [2022] NTSC 46; 368 FLR 268.
[138] NT ICAC ACT s. 18(1)(a).
[139] NT ICAC ACT s. 18(1)(b).
[140] NT ICAC ACT s. 18(1)(c).
[141] NT ICAC ACT s. 18(1)(d).
[142] NT ICAC ACT s. 18(1)(e).

104. Matters set out in Schedule 1 include the public interest in the general deterrence of improper conduct, the desirability of the public sector being open and accountable to the public, the benefit of exposing improper conduct to public scrutiny, the extent to which allegations of improper conduct are already in the public domain, and any other circumstances the NT ICAC considers relevant.

105. Section 21 provides that the NT ICAC is not subject to direction by any person about the way the NT ICAC performs its functions under the NT ICAC Act or the priority given to any particular matters.

106. Part 3 of the NT ICAC Act establishes the scheme by which the NT ICAC identifies and deals with improper conduct. That Part establishes regimes for mandatory reporting of suspected improper conduct, evaluations and reviews to identify improper conduct, the making of preliminary inquiries (including by use of coercive powers) to determine whether to investigate improper conduct or make a public statement, and the referral of matters to other entities that may involve improper conduct.

107. Pursuant to Division 5 of Part 3, if the NT ICAC has, or is aware of, information that, if true, would tend to show that improper conduct has occurred, is occurring or is at risk of occurring, the NT ICAC may commence an investigation into whether that is the case. For the purpose of conducting an investigation, the NT ICAC may require a person to answer specified questions or produce a specified item; may inspect financial records; may require a person to attend for examination, and may conduct the investigation in conjunction with a referral entity. Those powers are not limited to being exercised in respect of persons under investigation. Section 34(2)(c) states that "if a person is under investigation", a notice requiring that person to attend for examination must state that fact.

108. Once an investigation is concluded, the NT ICAC may make an investigation report to a "responsible authority" for the public body or public officer whose conduct is the subject of the investigation. A "responsible authority" is generally an entity having authority to deal with one or more matters relating to improper conduct the subject of the investigation or an entity whose functions include making future decisions in the public interest that may be better informed by receipt of the investigation report.

109. If the NT ICAC proposes to make an adverse finding about a person or body in an investigation report, the NT ICAC must give the person or body a reasonable opportunity to respond to the adverse material and must include a fair representation of the response in the report.[143]

110. The investigation report may include a finding as to whether a person has engaged in, is engaging in, or is about to engage in improper conduct and may include information as to whether an allegation of improper conduct has been referred to, or warrants referral to, a referral entity. Otherwise, the report may contain as much (or as little) information as the NT ICAC considers appropriate in relation to the subject matter of the investigation.

111. In addition to making reports, the NT ICAC may make public statements concerning any matter that the NT ICAC is dealing with or has dealt with. The NT ICAC may make a public statement for purposes which include "to provide information about action taken or that may be taken by the NT ICAC in relation to the matter", "to provide information about a referral, including the outcome of a referral", and "to address public misconception about a person or issue of which the NT ICAC has particular knowledge". The NT ICAC may make a public statement in the manner determined by the NT ICAC. A public statement may be made to the public at large, to a section of the public, or to a particular person or body. A public statement may not contain information the subject of privilege under s 82 of the NT ICAC Act.

National Anti-Corruption Commission

112. The National Anti-Corruption Commission commenced operation on 1 July 2023. It was established by the *National Anti-Corruption Commission Act* 2022 (Cth).

113. The Commissioner may decide to hold a hearing, or part of a hearing, in public if satisfied that exceptional circumstances exist, and that it is in the public interest to do so. The Commissioner may have regard to a range of factors in making this decision, including the benefits of exposing corrupt conduct to the public, and any unfair prejudice to person's reputation, privacy, safety or wellbeing.

[143] ICAC Act (NT) s. 50(2).

114. Once a corruption investigation is complete, the Commissioner must prepare a report and give it to the Attorney-General. The report must include:

a. the Commissioner's findings or opinions on the corruption issue and a summary of the evidence on which those findings or opinions are based; and
b. any recommendations (and reasons for recommendations) the Commissioner thinks appropriate (such as how an agency should respond to the findings).[144]

115. If, as a result of the evidence gathered during the investigation, the Commissioner is of the opinion that a person engaged or did not engage in serious or systemic corrupt conduct, the Commissioner must make a statement (for corrupt conduct) or an opinion (for non-corrupt conduct) to that effect in the report.[145] If a person gives evidence at a hearing and is not the subject of findings or opinions, the Commissioner may include a statement to that effect in the investigation report if the Commissioner is satisfied that it is appropriate and practical to do so to avoid damage to the person's reputation.[146]

116. If critical findings are included in a report, for example, that a person has behaved corruptly, the report cannot be finalised until those subject of critical findings have had an opportunity to respond. The NACC must wait a reasonable time for the person to respond. A person who is the subject of a finding or opinion that they engaged in corrupt conduct can request that the NACC include their response in the final report, and the Commissioner must generally comply.[147]

117. The Commissioner may publish the whole or a part of an investigation report if they have already provided a copy to the relevant Minister or the Prime Minister, and they are satisfied that it is in the public interest. The Attorney-General must table a report in Parliament if public hearings were held during the investigation or public submissions were invited. This means that after tabling, the report becomes publicly available. In some cases, the Commissioner may be required to consult again with any person or entity who is subject to a critical finding, opinion or recommendation before publishing the investigation report.[148]

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[144] NACCA s. 149.
[145] NACCA s.149(3).
[146] NACCA s. 149(5).
[147] NACCA ss. 153 and 157.
[148] NACCA ss. 154 - 156.

IMPACT OF PUBLIC REPORTING POWERS ON INDIVIDUALS

118. The impact on the reputation of individuals of the public reports of the various analogues of the CCC considered by the High Court has been the subject of comment by the High Court on a number of occasions now. It was acknowledged in *Ainsworth* and *Balog*. More recently, *AB v IBAC*, the High Court described that impact as "manifest".[149] It was said in the report of the Independent Gleeson and McClintock Review that:[150]

> The capacity of a public finding of corrupt conduct to cause reputational damage is too obvious to require elaboration. It should be noted, also, that not all reputational damage associated with a public inquiry is the result of a considered and reasoned conclusion expressed in a report. When the case of *Cunneen* was before the New South Wales Court of Appeal,[151] Basten JA referred to the potential for harm that can arise from publicity associated with the conduct of proceedings even before any ultimate findings are made.[152]

119. The effect on reputation by public reports has been recognised by the ACT legislation. Section 204 of that legislation provides:

> **Reputational repair protocols**
>
> (1) The commission must make protocols (the reputational repair protocols) about how the commission is to deal with damage to a person's reputation if—
>
> (a) the commission publishes in an investigation report, special report, or commission annual report—
>
> (i) a finding or opinion that a person has engaged in, is engaging in, or is about to engage in, corrupt conduct; or
>
> (ii) a comment or opinion which is adverse to a person; and

[149] *AB v IBAC* at [22].
[150] See page 17 [3.2.2] of that report.
[151] *Cuneen v Independent Commission Against Corruption* [2014] NSWCA 421.
[152] Ibid [100].

(b) any of the following happens:

(i) the matter is referred to a prosecutorial body but the person is not prosecuted for an offence arising out of the investigation;

(ii) the matter is referred to a prosecutorial body, the person is prosecuted for an offence arising out of the investigation and—

(A) the prosecution is discontinued or dismissed; or

(B) the person is found not guilty of the offence; or

(C) the person is convicted of the offence but the conviction is quashed, nullified, or set aside; or

(D) the person is otherwise cleared of wrongdoing;

(iii) the person is the subject of termination action arising out of the investigation and the person is cleared of wrongdoing.

(2) The reputational repair protocols are a notifiable instrument.

120. In addressing the balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation, the ACT Integrity Commission developed protocols (valid as at September 2020) which provide guidance which may be required to address damage to a person's reputation in specific circumstances.[153]

121. As set out in the protocol:[154]

> The discontinuance or dismissal of a prosecution, the acquittal of a person or entity, or the setting aside of a conviction on a particular criminal charge relating to the same or related subject matter as has been the subject of corrupt conduct findings by the ACTIC may, understandably, give rise to questions about the

[153] *Integrity Commission Act* 2018 (ACT) s. 204.
[154] Integrity Commission Reputational Repair Protocols 2020, 2.5.

appropriateness of the ACTIC's earlier corrupt conduct findings. The ACTIC notes that such outcomes do not, of themselves, demonstrate the person or entity has been exonerated, in the sense that the outcomes may suggest that the adverse findings were not available, should not have been made, and should be expunged. There are a number of reasons for this:

i. The ACTIC makes its findings based on the balance of probabilities, as opposed to the criminal standard of proof (beyond reasonable doubt). A conclusion by a court that criminal charges have not been proved beyond reasonable doubt, or the dismissal of a prosecution or overturning of a finding of guilt does not demonstrate that the ACTIC, in considering related matters according to a different standard of proof, should have made different findings.

ii. The rules of evidence and criminal procedure do not apply to proceedings in the ACTIC. Evidence that may have formed the basis of ACTIC findings may be inadmissible in criminal proceedings, or new evidence may be available in the criminal proceeding that was unavailable to the ACTIC.

iii. There is no commensurate criminal offence of 'corrupt conduct' contained in the ACT statute books to the definition of 'corrupt conduct' in ss. 9, 10, and 11 of the Act.

122. The protocol states that measures that might be taken to address the damage to reputation include a letter to the affected person and a notification on the ACT Integrity Commission website. Whilst no doubt these measures are laudable, the effects of reputational damage caused by the reports of official inquiries are often irreversible.

JUDICIAL REVIEW OF PUBLIC FINDINGS

123. Reports of official inquiries can detrimentally affect reputation. However, they do not affect rights. Therefore, they cannot be characterised as exercises of administrative power that are amenable to orders by which they may be quashed or set aside in

common law and statutory forms of judicial review.[155] The only exception to this are the determinations of Integrity Tribunals in Tasmania which, as discussed above, are the subject of an express conferral of jurisdiction under that State's judicial review statute. Apart from Tasmania, the mechanism in other jurisdictions for judicial review of public findings of official inquiries is by way of declaratory relief in the Supreme Court of each State or Territory's supervisory jurisdiction.[156]

124. Whilst there are differences, discussed above, as to how judicial review of public findings of official inquiries occurs in each jurisdiction, what is common to all jurisdictions is the governing principle applicable to all judicial review, that it is not a review of the "merits" of the exercise of power under consideration. As Justice Brennan famously said in *Attorney-General (NSW) v Quin*:[157]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

125. Thus, as set out by Justice McDougall in the decision of *Duncan v ICAC* grounds for challenge to public findings of official inquiries typically include that:[158]

a. there is a material error of law;

b. the reasoning is not objectively reasonable, in the sense that the decision was not one that could have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences therefrom;

[155] *Ainsworth* at 580-581; *Wells v Carmody* [2014] QSC 59 at [25].
[156] *Ainsworth* at 581-582.
[157] (1990) 170 CLR 1 at 36-37.
[158] *Duncan v Independent Commission Against Corruption* [2014] NSWSC 1018; 311 ALR 750 at [35].

c. there is a finding that is not supported by any evidence whatsoever - that is to say, there is no evidence that could rationally support the impugned finding;

d. relevant matters have not been taken into account, or irrelevant matters have been taken into account; and

e. there has been a material denial of natural justice.

126. The above grounds, that concern the process of making findings, are more limited than they might otherwise appear to a non-legally trained person. The grounds that concern taking into account irrelevant considerations and failing to take into account relevant considerations are grounds that are based upon what, as a matter of statutory interpretation, may and may not be taken into account.[159] Those considerations are identified primarily, perhaps entirely, by reference to the Act under which the relevant exercise of power is made, rather than the facts of the case.[160]

127. The ground that a finding is not supported by any evidence whatsoever, is not made out merely on the basis that the evidence is insufficient to support the finding. The ground literally means what it says. There must be no evidence *whatsoever* to support the finding for the ground to be made out.[161]

128. Finally, the test for establishing the ground based upon unreasonable reasoning is "stringent" and will only be established if the reasoning is so unreasonable that no one could have properly adopted the reasoning.[162] The types of circumstances where it might be satisfied are where only one conclusion could have been made on the evidence and that conclusion was not made, or the finding was simply not open on the evidence or there is no logical connection between the evidence and the inferences or conclusions drawn.[163]

129. Thus, a person whose reputation has been destroyed by the report of an official inquiry might have a genuine sense of grievance flowing from inadequacies in the reasoning

[159] *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 49-51.
[160] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-348 [73].
[161] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.
[162] *Drumgold v Board of Inquiry – Criminal Justice System (No 3)* [2024] ACTSC 58 at [358]-[361].
[163] *Drumgold* at [362].

underpinning, or evidentiary basis for, the findings against them, but be left with no legal redress to vindicate that grievance.

THE HUMAN RIGHTS ACT

130. Reputation is one of the human rights which are recognised as deserving of protection by s. 25 of the HR Act. Also recognised by that section is a person's right to privacy. There is, however, a noteworthy distinction between how the rights to privacy and reputation are recognised by s. 25 of the HR Act. Whilst that section provides that a person has a right to not have their privacy "unlawfully" **and** "arbitrarily" interfered with, the section merely recognises a person's right to not have their reputation "unlawfully" attacked. There is no protection against arbitrary attacks on reputation recognised by the section. This difference is illustrated by judicial consideration of the cognate equivalent Victorian legislation.

131. A similar provision to s. 25 of the HR Act is set out in the Victorian Charter of Human Rights.[164] The scope of the privacy right was considered in the decision of *Thompson (in his capacity as Governor of Barwon Prison) v Minogue*.[165]

132. It was acknowledged in *Thompson* that "[t]he adjective 'arbitrary' is wider than the adjective 'unlawful' in that an interference with a person's privacy may be arbitrary even if it is not unlawful.[166] However, their Honours went on to find that the precise scope of the term 'arbitrary' for the purposes of s 13(a) of the Charter has not been settled.

133. The distinction between "arbitrary" and "unlawful" was also considered in *HJ v Independent Broad-based Anti-corruption Commission*[167] by Beach, Kyrou and Kaye JJA, who considered that though there was some "discussion around the meaning of 'arbitrary' in the Charter", it was not necessary to add to that discussion beyond noting that the "the adjective 'arbitrary' is wider than the adjective 'unlawful' in that an

[164] *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[165] (2021) 67 VR 301 at [49].
[166] Ibid, citing *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 66–7 [198]–[199], per Kyrou JA, McLeish JA and Niall JA.
[167] (2021) 64 VR 270, 305 [152].

interference with a person's privacy may be arbitrary – for example, because it is capricious – even if it is not unlawful".[168]

134. As the part of these submissions that discuss judicial review of official inquiry findings show, there is a low bar to be satisfied in order for those findings to be "lawful". Notwithstanding flaws in reasoning and evidentiary bases, those findings may still be "lawful". Even though those flaws might lead to a conclusion that the findings are "arbitrary", the HR Act offers no protection to an individual whose reputation has been attacked by the findings.

WHAT SHOULD BE DONE?

What should be the ambit of the Commission's power to make public findings statements about individuals?

135. It is submitted that the power of the CCC to make public findings against individuals should be subject to the following limitations.

136. **Firstly**, similarly to the position in Victoria and New South Wales, it should be clear that the CCC should have no power to make findings that individuals have committed criminal offences or conduct that warrants disciplinary action. Findings of that kind have the serious potential to prejudice any subsequent or extant criminal or disciplinary proceedings. Where proceedings are not commenced, the individual the subject of the finding will be left with a stain on their reputation which they cannot easily remove. The making of the findings by the CCC will effectively place the CCC in the position of adjudicator of criminal and disciplinary charges whilst not being subject to the same constraints and appeal processes applicable to Courts and Tribunals that ordinarily decide those charges. Further, there is an obvious and uncomfortable tension between the role of the CCC as investigator and the CCC operating as a de facto adjudicator of serious allegations. There is also a risk of abuse by the CCC of a power to make findings of this kind in circumstances where the evidence is insufficient to warrant criminal or disciplinary proceedings in the normal way. The concerns with the CCC taking on this role are not diminished by the fact that the CCC has no power to punish criminal conduct or impose disciplinary sanctions. The impact on a person's reputation

[168] (2021) 64 VR 260, 305 [152].

and livelihood by the publication of serious findings of an official inquiry can be so dramatic as to be equivalent to, or worse than, a punishment that might be imposed by a criminal Court or disciplinary Tribunal.

137. **Secondly**, the CCC should have no power to make findings that individuals have engaged in corrupt conduct for the same reasons that they should not have power to find that individuals have committed criminal offences or conduct warranting disciplinary sanction. By reason of the definition of corrupt conduct in s. 15 of the CC Act, a finding that an individual has engaged in corrupt conduct cannot be made without a finding that they have either committed a criminal offence or a disciplinary breach warranting dismissal. The historical review of past reports of the CCC and its predecessors demonstrates that it has achieved much by way of public reports, including reports that deal with the conduct of individuals, without going so far as to specifically find that individuals have engaged in corrupt conduct or conduct of the relevant kind defined under the predecessors to the CC Act. That has included facilitating the objects of building capacity of agencies and making recommendations for legislative reform. The historical experience demonstrates that the destructive impacts on the reputations of individuals that would be caused by a power to make findings that persons have engaged in corrupt conduct are not justified by any objects of the CC Act. Those objects can be achieved without those impacts. Further, the approach in NSW to confine the power to make findings of corrupt conduct to "serious" cases is not an adequate protection. A limitation to "serious" cases is not sufficiently objective to protect individuals from potential abuses of decisions by the CCC to publish findings.

138. **Thirdly**, the CCC should only be empowered to make findings in its reports of public inquiries. Given the impacts on individuals, particularly their reputations and livelihood, findings against them should only be made after the evidence that supports those findings has been heard and challenged in public hearings. That would ensure that any findings made by the CCC are the subject of proper public scrutiny. That may be contrasted with a position where the CCC publishes a report making extremely damaging findings about a person where the public has not had the opportunity to see the witnesses on which those findings are based give evidence and to see that evidence appropriately tested by cross-examination. The report will no doubt be replete with references to the evidence upon which it is based but that evidence will not be available

or easily accessible to the public. The evidentiary basis for the findings against the person will be opaque to all but those who that have had a direct involvement in the CCC investigation. There is an obvious unfairness to a person who is subject to findings of that kind which are made without proper public scrutiny. Further, it is open to wonder why there would be sufficient public interest in making findings with that kind of impact on a person, in circumstances where the CCC has not deemed there is sufficient public interest to warrant the exercise of its discretion to hold a public inquiry.

139. **Finally**, whilst the CCC should of course be able to make public statements about matters that it is investigating or has investigated, it should not be permitted to express opinions about whether particular individuals have committed criminal offences or corrupt conduct. It should not express opinions about the conduct of particular individuals except to the extent that those opinions are contained in public reports permitted in the circumstances described above. Otherwise, the above protections would be illusory.

There should be an adequate right of review of any public findings that the CCC is empowered to make

140. It is submitted that there should be an adequate right of review of any public findings against individuals that the CCC is empowered to make. That review should either be heard by the Supreme Court or a special Tribunal constituted by a serving or retired Supreme Court judge amenable to judicial review by the Supreme Court. The grounds of review should include the existing grounds already available in traditional judicial review. They should also include a ground that findings made by the CCC **"could not reasonably be supported by the evidence"**. A proposal that a ground of that kind should be available for challenges to ICAC findings was rejected by the Gleeson and McClintock review. In their report, they said:

> 3.4.6 The New South Wales Bar Association made a submission to the Panel which recognised the problem referred to in paragraphs 3.4.4 and 3.4.5. It argued that an appropriate form of review would be one analogous to that undertaken by the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), with any counterpart of section 5(1)(h) framed in more expansive language such as: "the decision was not

reasonably supported by the evidence or other material before the Commission".

3.4.7 The ground in section 5(1)(h) is "that there was no evidence or other material to justify the making of the decision". That is not merits review. What is proposed seems more like an expanded form of what is sometimes called *Wednesbury* unreasonableness. It appears close to administrative oversight rather than judicial review.

3.4.8 In addition to the risk of confusion of judicial and administrative functions, the Panel considers that to provide for merits review would add to the problem of misunderstanding as to the ICAC's role. It would make it look even more like a court.

141. The above concerns do not reflect the Queensland experience. There has long existed in Queensland a ground of appeal to a Court from findings of a particular kind of public inquiry on the ground that those findings "could not reasonably be supported by the evidence". That ground is provided by s. 50(5)(d) of the *Coroners Act 2003* (Qld) and it is available on an appeal to the District Court from findings of Coroners at the conclusion of inquests. It is a ground that has been the subject of appellate consideration by the Queensland Court of Appeal.[169] Its existence over more than two decades has not altered in any inappropriate respect the functioning of the District Court or Coronial Inquests.

RETROSPECTIVITY

142. Retrospective laws have rightly long attracted the condemnation of the law. As William Blackstone wrote in his *Commentaries on the Laws of England:*[170]

> [h]ere it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must

[169] *Hurley v Clements* [2010] 1 Qd R 215.
[170] *Commentaries*, 17th ed. (1830), volume.I, pp 45-4.

> of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement.

143. In *Polyukhovich*,[171] Dawson J said:[172]

> The resistance of the law to retrospectivity in legislation is to be found in the rule that, save where the legislature makes its intention clear, a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement.

144. It is also to be noted that the "fundamental legislative principles", recognised by s. 4 of the *Legislative Standards Act 1992* (Qld), require that legislation have sufficient regard to the rights and liberties of individuals. One of the criteria prescribed by that section for whether those principles are observed by legislation is that legislation "does not affect rights and liberties, or impose obligations, retrospectively".

145. Any legislative change, if applied retrospectively, has the capacity to infringe upon a person's rights by subjecting them to unforeseen and potentially adverse consequences for actions or decisions made in the past and against the background of the state of the legislature as it existed at the time.

146. Any opportunity that a person might have had to govern one's conduct according to the law, as it existed, at the time is unavailable where retrospective application occurs. A person has a fundamental right to certainty and predictability, and by retroactively altering the legislative framework and imposing new obligations or liabilities, this right is undermined and effectively excluded.

147. There is a further matter to be identified in relation to the question as to whether any change to the law presently under contemplation should be made retrospectively. Reports of past inquiries will not have been the subject of the statutory protections which these submissions recommend should accompany any proposed change. Retrospectively authorising the publication of past reports in those circumstances will

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[171] *v Commonwealth* ("War Crimes Act case") [1991] HCA 32; (1991) 172 CLR 501.
[172] *Polyukhovich v Commonwealth* ("War Crimes Act case") [1991] HCA 32; (1991) 172 CLR 501 (14 August 1991) at [17] per Dawson J – citations omitted.

involve the circumvention of protections deprecated by the High Court in *Carne*. It is submitted that should not occur.

CONCLUSION

148. It is submitted that the questions posed for the consideration of this Review involve fundamental issues affecting the rule of law and the system of democracy. It is respectfully submitted that the Review should give careful consideration to the matters identified in these submissions in addressing those issues.

AD Scott KC

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